No. 11353

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BASICH BROTHERS CONSTRUCTION COMPANY, a Corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corporation,

Appellants.

vs.

UNITED STATES OF AMERICA, for the use of BERT TURNER, FRANK E. HINMAN and GARLAND D. ENGLAND,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement of Jurisdiction.

The appellants' Jurisdictional Statement sets forth substantially the pleadings and facts upon which are based the jurisdiction of the District Court in this case and of this Court on Appeal.

Statement of the Case.

The appellants' Statement of the Case is substantially correct, so far as it goes, except the statement found at the bottom of page 3 of appellants' brief that "The production of the aforesaid material was under the sole and exclusive supervision of Duque & Frazzini pursuant to

the requirements contained in their said contract with said Basich Brothers Construction Co. of date February 7, 1945." The record shows that the subcontractor, Duque & Frazzini, was required by Article I of the Subcontract Agreement [Tr. p. 15] to furnish all materials and equipment and perform all labor required for the completion of the work in accordance with the provisions and specifications of the original contract and "under the direction and to the satisfaction of the Principal's Engineer," and that this supervision was exercised not only by the Principal's Engineer, but by the general superintendent of the prime contractor, as well, who on at least one occasion took over the active operation of the Duque & Frazzini job. [Tr. pp. 78, 79, 80.]

The following additional facts should be noted:

Basich Brothers actually paid all labor payrolls of Duque & Frazzini [Tr. pp. 21 and 45];

That all of the work which Duque & Frazzini did pursuant to the Subcontract referred to in the complaint was done on premises belonging to Stefan Gollob located approximately four and one-half miles from the base referred to in the contract as Davis-Monthan Field. That said premises were leased to the defendant, Basich Brothers Construction Co., by Stefan Gollob for the purpose of making available to said Basich Brothers Construction Co. the gravel, rock, and earth on the premises for use upon the work required of the defendant, Basich Brothers Construction Co., under the contract alleged in the complaint, and that the said defendant, Basich Brothers Construction Co., paid all rentals for the use of said premises for said purposes;

That said site was first selected by the United States Engineers before Basich Brothers Construction Co. could acquire the site from the owner for the purposes aforesaid [Tr. pp. 44, 45];

That in the performance of its contract with the United States, Basich Brothers Construction Co., the prime contractor, maintained and operated two plants on the leased premises above referred to [Tr. p. 45];

That the subcontract involved an amount in excess of the sum of $100,000.00 [Tr. p. 45] and contains a provision for renegotiation under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528, 77th Congress, pp. 335-6, U. S. Code Congressional Service, 1942, which provides for renegotiation of the price of *subcontracts* [Tr. pp. 22, 23, 24];

That the defendant Basich Brothers Construction Co., as third party plaintiff, brought into this case the Glens Falls Indemnity Company of Glens Falls, New York, surety on the subcontract bond, as a third party defendant, alleging that said surety was liable to the said defendant and third-party plaintiff for all of the plaintiff's claim against it.

Summary of Argument.

The firm of Duque & Frazzini was a subcontractor within the meaning and scope of the "Miller Act" under the definition of that term established by the Supreme Court in the case of *MacEvoy v. United States*, 322 U. S. 102 at 108, 88 L. Ed. 1163 at 1168.

Argument.

The appellants urge upon this court the rule as to subcontractors applied in a line of state court decisions which hold that one cannot be a subcontractor under the various state statutes considered unless he actually installs the material furnished into the structure or improvement in question. Appellants cite the case decided by this court of *Northwest Roads Co., et al. v. Clyde Equipment Co.,* 79 F. (2d) 771. In that case this court specifically stated that it was unnecessary to consider what may be the general rule of distinction between a subcontractor and a materialman, for the reason that the Supreme Court of Washington had determined that question in the case of *Neary v. Puget Sound Engineering Company,* 114 Wash. 1, 194 Pac. 830, and that this court was bound by the construction of the State Supreme Court in that case. That decision, therefore, is not applicable to the question presented on this appeal.

There is another line of state cases which adopts the rule that a subcontractor is anyone who takes from the prime contractor a specific part of the material requirements of the original contract, such material to be furnished in accordance with the plans and specifications of the original contract; and this is so regardless of whether such subcontractor actually installs the material in the improvement or not.

The following cases illustrate this rule:

Holt v. City of Melrose (Mass.), 41 N. E. (2d) 562;

People—use of Youngs v. U. S. Fid. & Guar. Co. (Mich.), 249 N. W. 20; following *Avery v. Ionia County* (Mich.), 39 N. W. 742;

Standard Accident Insurance Co. v. Deep Rock Oil Corp. (Okla.), 68 P. (2d) 808.

The Supreme Court of the United States has clearly adopted and applied the rule announced in the latter group of cases in construing the Miller Act in the case of *MacEvoy v. United States, supra.* In that case the Supreme Court laid down this definition of a subcontractor, (p. 108):

> "A subcontractor is one who performs for and takes from the prime contractor a specific part of the labor *or* material requirements of the original contract."

That the firm of Duque & Frazzini were subcontractors within the scope of this rule would seem to require no argument in the light of this record. The subcontract plainly calls for the performance of a specific part of the material requirements of the original contract to be performed in accordance with "all the provisions of the original contract and of the specifications and plans referred to therein," all of which are made a part of the subcontract agreement. [Tr. pp. 14, 15.] This material was to be produced and fabricated on the premises leased to and under the control of Basich Brothers Construction Co. and upon which they had two plants and were doing

part of the work under the prime contract. Not only that, but the prime contractor actually paid for all labor used in the work done by Duque & Frazzini under its subcontract and required of said subcontractors a performance bond upon which the prime contractor has brought suit in this action to hold the surety on that bond liable to it for the plaintiff's claim herein against the defendants.

Appellants mention the rule laid down in the *MacEvoy* case on page 14 of their brief and follow it with a one-half page argument to the effect that Duque & Frazzini were not subcontractors under the rule laid down in the state cases first above mentioned, because Duque & Frazzini did not undertake to actually install the material furnished into the runways. This argument is made in the face of the Supreme Court's definition which makes no such requirement.

The appellants do not argue, nor could they in good faith argue upon this record, that Duque & Frazzini did not take from the prime contractor a specific part of the labor or material requirements of the original contract.

Duque & Frazzini being subcontractors under the Miller Act, the plaintiffs are entitled to recover against the prime contractor and the surety on its payment bond for labor and materials furnished the subcontractor, under and by virtue of the proviso of Section 270b of the Miller Act.

Conclusion.

The appellants concede that the judgment of the District Court was correct and must be affirmed if Duque & Frazzini were subcontractors under the Miller Act. That they were such under the rule laid down in the *MacEvoy* case clearly appears from this record. The appellees respectfully submit, therefore, that the judgment should be affirmed.

Respectfully submitted,

Clifford R. McFall,
Attorney for Appellees.